6 March 2017

The Executive Director
Australian Law Reform Commission
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Email: elder_abuse@alrc.gov.au

PRINCIPAL MEMBERS

Dear Ms Wynn,

Thank you for the opportunity to provide a submission to the ALRC on elder abuse: Discussion Paper 83.

The GRC Institute Inc. (GRCI) supports the overall premise of the discussion paper and the proposal and objective to provide protection for vulnerable individuals. We have looked in detail at the proposals and questions and would like to provide detailed feedback to the ALRC below.

Proposals 2-1 (national plan) and 2-2 (prevalence study):

We support both proposals. In particular, elder abuse is not widely-understood yet.

Proposal 3-1

No comment.

Proposal 3-2

Our concern with proposal 3-2 – is that older people have the right to refuse support or protection. This seems incongruous– if you are being abused then the refusal should be tested. At the least it might need a doctor or psychologist's report to determine the reasonableness of the refusal. We can see scenarios where financial institutions would have potentially significant issues if they were to accept at face value an older person changing financial arrangements with a pressuring adult child beside them. It should be to a degree a little like the position with husband/wife guarantees where a spouse is required to get independent advice and certificate before the institution will release funds etc. following the principles of Amadio's Case (Commercial *Bank of Australia Ltd v Amadio* (1983) 151 CLR 447).

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This concept to an extent is carried forward into the proposals for the enduring POA and guardianship where independent attestation is required from both a medical and a legal practitioner. Indeed it is disingenuous to believe that transfers of assets outside of the enduring POA etc should not be offered the same level of protection for the transferee.

The issue of the potential liability of trustees is also an important issue. In the superannuation sector a trustee is required to exercise judgment relating to the release of funds. If the withdrawal as an example is manifestly unjust, a trustee could refuse the transaction. It is important that 3-2 is clarified to the extent necessary to provide guidance for trustees in the exercise of their judgment.

Proposal 3-3

No comment.

Proposal 3-4

No comment.

Proposal 3-5

No comment.

Proposal 5-1

There is a lot of support for this idea. There has already been a 2012 Report on Guardianship and Administration by the Victorian Law Reform Commission (VLRC) suggesting that the register should be industry-funded through subscription fees by institutional users, such as banks, or by search fees. As an alternative, it would need to be government-funded. The costs of implementation, plus ongoing administration costs will be passed inevitably to customers. It is important to ensure that the benefit of the register is balanced against this.

Proposal 5-2

No comment.

Proposal 5-3

No comment.

Proposal 5-4

No comment.

Proposal 5-5

We strongly support the concept that all administration, guardianship and attorneyship legislation have provisions allowing for courts to impose compensation orders on administrators, guardians and attorneys who breach their duties and misappropriate money. It will not help if the abuser is someone else, but it will help in these cases. There is already such a provision in the Victorian Powers of Attorney Act 2014 (Vic) (section 77) for use as a model.

Proposal 5-6

No comment.

Proposal 5-7

No comment.

Proposal 5-8

No comment.

Proposal 5-9

No comment.

Proposal 5-10

No comment.

Proposal 5-11

No comment.

Proposal 5-12

No comment.

Proposal 5-13

No comment.

Question 6-1 – 6-3

This issue is problematic. If training was mandatory, the cost of this training would have to be given serious consideration or run the risk of non compliance or reduced market competition. Often these arrangements are entered into urgently. Certainly there should be information packages for new guardians etc but to have these independently tested is too onerous a requirement in our view. Signing an undertaking in relation to their duties, with consequential penalties for non – observance would be helpful. A person who fails in their duties should then be held to account in civil or criminal penalties. In Victoria

new administrators are given a guide produced by OPA. This has obvious limitations, as someone can just ignore the guide. We agree that getting administrators and attorneys to sign an undertaking would be a better approach, particularly if it is able to break down the requirements.

Proposal 7-1

This item imposes a high burden on banks having regard to the concepts of 3-2. How can a bank take such reasonable steps where there is an explicit statement that an elderly customer could refuse – and not on reasonable grounds? Indeed in 7-2, the mere witnessing is not sufficient and a customer signing should not be exculpatory where the customer is clearly under duress or not in possession of their faculties.

Question 7-1 increases dramatically the burden on SMSF trustees.

1. Most SMSFs cannot afford the cost of a corporate trustee. The ATO administers such arrangements and to provide additional costs and administration burden is a significant penalty
2. We agree that there should be certain arrangements for loss of capacity. Many modern trust deeds that set up these arrangements do have these provisions, but a modification to SIS incorporating additional clauses in these deeds would be appropriate.
3. No additional duties should be imposed on non- beneficiary trustees or directors as there are already sufficient legal remedies should they fail to undertake their obligations
4. Increasing the remit of the Superannuation Complaints Tribunal to deal with SMSF issues is an interesting point. On the one hand this appears reasonable, but the SCT does not currently have the size or capacity to deal with disputes of this nature.
5. Additionally because of the nature of SMSFs, trustees and members are usually related. If there is elder abuse occurring the trustee or a member could be involved – increasing the complexity of the issue.

Proposal 7-2

No comment.

Question 7-2

No comment.

Proposal 8-1

No comment.

Question 8-1

No comment.

Proposal 9-1

No comment.

Proposal 9-2

Requiring binding death nominations (BDN) to be signed by 2 independent witnesses may lead to fewer such documents being executed. Most superannuation funds would prefer that these exist, but the take up in the general non advised community is low, and that is without requiring additional witnessing requirements. A more preferable outcome would be to consider making superannuation proceeds an asset that can be transferred by way of will, rather than a separate BDN.

Additionally there should be appropriate "safe harbours" for trustees who accept binding nominations in good faith that subsequently prove to be legally deficient in their execution.

Proposal 9-3

No comment.

Proposal 10-1

No comment.

Proposal 10-2

No comment.

Proposal 10-3

No comment.

Proposal 10-4

No comment.

Proposal 11-1

No comment.

Proposal 11-2

No comment.

Proposal 11-3

No comment.

Proposal 11-4

No comment.

Proposal 11-5

No comment.

Proposal 11-6

No comment.

Proposal 11-7

No comment.

Proposal 11-8

No comment.

Proposal 11-9

No comment.

Proposal 11-10

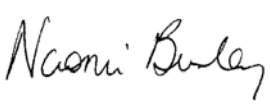
No comment.

Proposal 11-11

No comment.

We would love to discuss our submission further, should you have any questions I can be contacted directly with these questions.

Kind Regards,



Naomi Burley
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